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Maya bt Ahmad Fuaad lwn Pendakwa Raya

B MAHKAMAH TINGGI (SHAH ALAM) — RAYUAN JENAYAH NO BA-41LB-98–10 TAHUN 2018
ZULKIFLI BAKAR H
10 SEPTEMBER 2020

C *Prosedur Jenayah — Rayuan — Rayuan ke atas perintah dilepaskan tanpa dibebaskan — Tertuduh telah dilepaskan tanpa dibebaskan — Pendakwaan gagal untuk memberikan alasan mengapa tidak ingin meneruskan pendakwaan — Sama ada tertuduh sepatutunya dilepaskan dan dibebaskan — Kanun Tatacara Jenayah s 254*

D

Ini merupakan satu rayuan terhadap keputusan mahkamah majistret yang memerintahkan agar perayu dilepaskan tanpa dibebaskan dari pertuduhan di bawah s 182 Kanun Keseksaan kerana membuat laporan palsu kepada pihak polis. Responden telah membuat permohonan kepada majistret di bawah s 254 Kanun Tatacara Jenayah agar pendakwaan terhadap pemohon diberhentikan, dan majistret telah memerintahkan agar perayu dilepaskan tanpa dibebaskan ('DNAA'). Isu yang dibangkitkan untuk diputuskan oleh mahkamah tinggi adalah sama ada majistret terkhilaf daripada segi fakta dan undang-undang apabila gagal untuk memerintahkan agar perayu dilepaskan dan dibebaskan apabila responden telah menzahirkan dengan jelas bahawa mereka tiada niat untuk meneruskan pendakwaan terhadap perayu. Mahkamah Tinggi telah membenarkan bantahan awal yang dibangkitkan berkenaan dengan perintah untuk DNAA bukan satu perintah yang boleh dirayu namun telah menggunakan kuasa semakannya terhadap kes ini. Isu untuk diputuskan adalah sama ada majistret telah tersalah arah dari segi fakta dan undang-undang apabila memberikan perintah DNAA dan bukannya acquitted and discharge ('A&D').

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H **Diputuskan**, membuat semakan terhadap perintah mahkamah majistret dan memerintahkan agar perayu dilepaskan dan dibebaskan:

(1) Dalam kes ini surat makluman pihak pendakwa raya hanya menyatakan bahawa mereka ingin menarik semula pertuduhan terhadap perayu menurut s 254 Kanun Tatacara Jenayah. Namun tidak dinyatakan alasan mereka memohon pertuduhan ditarik semula. Seksyen 254(3) merupakan satu pengiktirafan bahawa majistret boleh memberikan perintah A&D di bawah peruntukan tersebut kerana pihak pendakwaan tidak lagi berniat dan berminat untuk membuktikan kes mereka. Seksyen 254 Kanun Tatacara Jenayah sendiri tidak mengikat majistret untuk

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mendengar semua keterangan didengar terlebih dahulu sebelum boleh memberikan perintah A&D berbeza dengan peruntukan di bawah s 173 Kanun Tatacara Jenayah. Majistret telah tersalah arah apabila memberikan perintah DNAA kepada perayu apabila pihak responden sendiri telah memilih untuk tidak meneruskan pertuduhan ke atas perayu tanpa menyatakan sebarang alasan yang mana ianya boleh disimpulkan sebagai tidak akan menawarkan sebarang keterangan lanjut bag menyokong pertuduhan yang dibuat sebelum ini (lihat perengan 16, 21 & 23).

[English summary

This was an appeal against the decision of the magistrates' court which ordered that the appellant be discharged but not acquitted for a a charge under s 182 of the Penal Code for lodging a false police report. The respondent made an application to the magistrate under s 254 of the Criminal Procedure Code that the prosecution against the appellant be discontinued and the Magistrate had ordered that the appellant be given an order of discharge not amounting to an acquittal ('DNAA'). The issue raised and to be decided by the High Court was whether the magistrate had erred in fact and law when failed to grant an order for the appellant to be acquitted and discharged when the respondent had made clear that they have no intention to continue to the prosecution against the appellant. The High Court had allowed the preliminary objection which was raised concerning the order for DNAA was not an appealable order however had used its revisionary powers in this case. The issue to be determined is whether the magistrate had erred in law and fact when ordering an order of DNAA and not an acquittal and discharge ('A&D')

Held, allowing the revision towards the order of the magistrates' court and ordering the appellant be acquitted and discharged:

(1) In this case, the letter informing that the public prosecutor only stated that they would like to withdraw the charges against the appellant under s 254 of the Criminal Procedure Code. However did not state the reason as to why they are seeking for the charges to be withdrawn. Section 254(3) has an acknowledgement that the magistrate can order an order of A&D under the said provision because the prosecution no longer intends nor is it interested to prove its case. Section 254 of the Criminal Procedure Code alone does not bind the magistrate to hear all evidence before giving an A&D order and is different with the provision under s 173 of the Criminal Procedure Code. The magistrate had erred when granting a DNAA order to the appellant when the respondent himself had chose to not proceed with the charges against the appellant without stating any grounds which it can only be concluded as will not give any further evidence to support the charges which was made previously (see paras 16, 21 & 23).]

Kes-kes yang dirujuk

Chu Chee Peng v PP [1973] 2 MLJ 35; [1973] 1 LNS 18, MP (dirujuk)
Gurdit Singh v PP [1983] 1 MLJ 264 (dirujuk)
PP v Au Seh Chun [1998] 6 MLJ 179, MT (dirujuk)
PP v Mat Zain [1948–1949] supp MLJ 142 (diikut)
PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP [1985] 2 MLJ 436, MA (dirujuk)
PP v Zainuddin & Anor [1986] 2 MLJ 100, MA (dirujuk)

Undang-undang yang dirujuk

Akta Mahkamah Kehakiman 1964 ss 31, 35(1)
Kanun Keseksaan ss 182, 325
Kanun Tatacara Jenayah ss 173, 173(f), 254, 254(3), 307(1), 316, 323, 325

Siti Rohaida Che Hamid (Timbalan Pendakwa Raya, Jabatan Peguam Negara) bagi pihak pendakwaan.
Kamarul Hisyam Kamarudin (The Chambers of Kamarul Hisham & Hasnal Rezua) bagi tertuduh.

Zulkifli Bakar H:

LATAR BELAKANG

[1] Perayu telah dituduh pada 16 April 2019 di Mahkamah Majistret Shah Alam di bawah s 182 Kanun Keseksaan kerana membuat laporan palsu kepada pihak polis.

[2] Pada 1 October 2018, setelah mempertimbangkan representasi perayu pihak responden telah membuat permohonan kepada majistret di bawah s 254 Kanun Tatacara Jenayah supaya pendakwaan terhadap perayu diberhentikan. Justeru, berikutan permohonan tersebut, majistret telah memerintahkan supaya perayu dilepaskan tanpa dibebaskan atau *discharge not amounting to an acquittal* ('DNAA').

[3] Perayu yang terkilan dengan perintah majistret tersebut telah memfailkan rayuan di mahkamah ini supaya perintah DNAA tersebut dibatalkan dan perintah lepas dan bebas atau *aquitted and discharge* ('A&D') di berikan kepada perayu.

[4] Mahkamah ini telah melaksanakan kuasa semakannya di bawah ss 323 dan 325 Kanun Tatacara Jenayah dan menggantikan perintah DNAA yang diberikan oleh majistret kepada A&D.

[5] Responden dalam kes ini pula tidak berpuas hati dengan keputusan mahkamah ini telah memfailkan rayuan ke Mahkamah Rayuan.

BUTIR-BUTIR RAYUAN.

[6] Merujuk kepada petisyen rayuan perayu di halaman 7 hingga 10 rekod rayuan Jld 1, adalah disimpulkan bahawa perayu menyatakan bahawa majistret telah terkhilaf dari segi fakta dan undang-undang apabila gagal memberikan perintah A&D setelah pihak responden menarik balik pertuduhan terhadap perayu menurut peruntukan s 254 Kanun Tatacara Jenayah apabila responden telah menzahirkan dengan jelas bahawa mereka tidak mempunyai niat untuk meneruskan pendakwaan terhadap perayu.

PENILAIAN MAHKAMAH.

[7] Seksyen 316 Kanun Tatacara Jenayah telah menggariskan tanggungjawab dan kuasa mahkamah yang mendengar rayuan seperti berikut:

> 316 Decision on appeal
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> At the hearing of the appeal the judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —
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> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
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> (b) in an appeal from a conviction or in an appeal as to sentence —
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> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
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> (c) *in an appeal from any other order, alter or reverse such order.* (Penekanan ditambah.)

[8] Sebelum saya menyentuh tentang inti pati rayuan ini sendiri, ingin dijelaskan bahawa pihak responden dan peguam pemerhati dalam kes ini telah membangkitkan bantahan bahawa rayuan ini tidak boleh didengar memandangkan ianya bukanlah merupakan satu keputusan yang boleh dirayu seperti mana yang dinyatakan di bawah s 307(1) Kanun Tatacara Jenayah yang menyatakan:

> (1) Except in any case to which section 305 applies and subject to sections 305 and 306 *any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter* to which he is a party *may prefer an appeal to the High Court against that judgment, sentence or order in respect of any error in law or in fact* or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence by lodging, within fourteen days from the time of the

judgment, sentence or order being passed or made, with the clerk of the Magistrate's Court a notice of appeal in triplicate addressed to the High Court and by paying at the same time the prescribed appeal fee.

[9] Dalam memutuskan perkara ini saya telah merujuk kepada kes *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 di mana Hashim Yeop Sani, Hakim Mahkamah Persekutuan (ketika itu) menyatakan:

> With regard to the first question, under s 307(i) of the Criminal Procedure Code any person dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case to which he is a party may appeal to the High Court against any such judgement, sentence or order. The word 'order' is preceded by the words 'Judgment' and 'sentence'. *The order must therefore be a final order in the sense that it is final in its effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties.* (Penekanan ditambah.)

[10] Berpandukan kepada nas undang-undang di atas dan setelah memperhalusi sifat DNAA itu sendiri, saya bersetuju bahawa perintah yang diberikan oleh majistret tersebut bukanlah satu perintah yang telah melupuskan hak pihak-pihak dalam tindakan ini. Sepertimana yang sedia dimaklumi bahawa sesebuah kes yang diperintahkan DNAA pada bila-bila masa boleh dipertuduhkan semula di bawah arahan pendakwa raya.

[11] *Justeru saya memerintahkan supaya rayuan ini dibatalkan kerana sifat perintah majistret tersebut bukanlah sebuah perintah yang boleh dirayu. Walau bagaimanapun, demi keadilan semua pihak dalam kes ini, saya telah menggunakan kuasa semakan saya sebagai seorang hakim Mahkamah Tinggi terhadap kes ini*. Kuasa ini telah digariskan dengan jelas di bawah ss 31 dan 35(1) Akta Mahkamah Kehakiman 1964 yang menyatakan:

Seksyen 31 Akta Mahkamah Kehakiman 1964:

> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any Jaw for the time being in force relating to criminal procedure.

Seksyen 35(1) Akta Mahkamah Kehakiman 1964:

> (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or *may give to the subordinate court such directions as to the further conduct of the same as justice may require.*

[12] Walaupun kes ini telah dimulakan secara rayuan, pada hemat saya, ianya boleh dijadikan pendengaran semakan berdasarkan kepada peruntukan s 325 Kanun Keseksaan yang menyatakan:

> (1) A Judge may, *in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge,* in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.
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> (2) No order under this section shall be made to the prejudice of the accused unless he has had on opportunity of being heard, either personally or by advocate, in his own defence.
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> (3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

[13] Kaedah ini disokong dan disahkan dalam kes *Gurdit Singh v Public Prosecutor* [1983] 1 MLJ 264 di mana Mohamed Dzaidin, hakim Mahkamah Tinggi (ketika itu) menyatakan dalam penghakimannya:

> *My powers of revision are provided under s 325 of the Criminal Procedure Code*. These powers are consistent with s 31 of the Courts of Judicature Act 1964. There are a number of authorities with regard to the powers of revision. In Mallal's Criminal Procedure (Fourth Ed, p 482) it is stated as follows:
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> > The powers of revision are given to the High Court alone, and *the powers of revision are given to the High Court in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge.* Their Lordships are clearly of opinion that *when the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed, and the High Court can then, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its revision powers if it chooses to do so*, per Lord Atkin in *Chunbidya v R*, LR 62 IA 36; AIR 1935 PC 35. (Penekanan ditambah.)

[14] Mengambil kira dalam kes ini rekod rayuan telah disediakan dan diserahkan kepada saya, ertinya rekod prosiding bagi kes di hadapan majistret telah sampai kepada saya melalui rekod rayuan dan saya boleh menjalankan kuasa semakan ke atas kes ini.

[15] Berbalik kepada isu utama dalam kes ini samada majistret telah tersalah arah dari segi fakta dan undang-undang apabila memberikan perintah DNAA dan bukannya A&D. Pada hemat saya, setelah meneliti latar belakang fakta kes ini, perintah yang sewajarnya diberikan oleh majistret adalah A&D dan bukannya DNAA.

[16] Alasan utama adalah kerana dalam kes ini surat makluman pihak pendakwa raya hanya menyatakan bahawa mereka ingin menarik semula pertuduhan terhadap perayu menurut s 254 Kanun Tatacara Jenayah. Namun

A tidak dinyatakan alasan mereka memohon pertuduhan ditarik semula.

[17] Saya telah berpandukan kepada kes *Public Prosecutor v Mat Zain* [1948–1949] supp MLJ 142 di mana Callow, hakim Mahkamah Agung (ketika itu) menyatakan:

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> I presume the withdrawal was made by the prosecuting officer in accordance with s 254 of the Criminal Procedure Code. *This procedure may be caused by it becoming clear that the charge is not sustainable.* (Sohoni, 14th Ed p 651), *or for reasons of expediency. The court should record the reasons, and the discharge should amount to an acquittal unless good cause is otherwise shown*; an accused person is entitled to trial and determination; *only in exceptional circumstances should the charge be permitted to remain indefinitely held against him.* (Penekanan ditambah.)

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[18] Saya sendiri telah merujuk dan memperhalusi s 254 Kanun Tatacara Jenayah yang menyatakan seperti berikut:

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> (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
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> (2) At any stage of any trial before a Sessions Court or a Magistrates Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.
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> (3) *Such discharge shall not amount to an acquittal unless the Court so directs.*

[19] Bagi menjelaskan maksud 'shall be discharged dan setakat mana kuasa majistret di bawah frasa 'unless the court so directs' saya telah merujuk kepada kes *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100 di mana Salleh Abas, Ketua Hakim Negara (ketika itu) menyatakan:

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> The question which we have to answer here was *whether a magistrate holding a summary trial could acquit and discharge the accused without hearing the evidence for the prosecution at all ...*
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> Until the decision of Mohamed Azmi J (as he then was) in *Public Prosecutor v Mohamed Said* [1984] 1 MLJ 50; [1982] 1 LNS 115 it was generally considered as settled law that the magistrate had no such powers. Murray-Aynsley J in *Kuppusamy v Public Prosecutor* [1948] MLJ 25 *held that the earlier stage at which a magistrate can acquit an accused person is after hearing all the evidence for the prosecution. This ruling was accepted and followed by Ong Hock Sim J in Public Prosecutor v Goh Kee Chuan* [1967] 1 MLJ 174; [1966] 1 LNS 138 *and Public Prosecutor v Mahmud* [1974] 1 MLJ 85; [1973] 1 LNS 119. This view was accepted by the Federal Court, whose judgment was delivered by Ong J in *Ong J in Chuu Chee Peng*

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v Public Prosecutor [1973] 2 MLJ 35; [1973] 1 LNS 18 ...

In *Chu Chee Peng's case the court was clearly of the view that a magistrate could not order an acquittal of the accused without hearing all the evidence which could be material to the prosecution case* and that any discharge ordered by the magistrate without hearing such evidence could not amount to an acquittal and therefore could not be set up as a defence of autrefois acquit should the accused be subsequently recharged for the same offence. *The court in no uncertain terms said that there were two circumstances in which a magistrate could order an acquittal:*

(1) When after all the evidence has been heard no case has been made out to support the charge, the acquittal is mandatory at the end of the prosecution (section 173(f));

(2) *When because the main prop of the prosecution case has prematurely collapsed and further proceeding would be an exercise in futility, the prosecution may in its discretion offer no further evidence (section 254)*

Any discharge of the accused other than in these two circumstances, such as a discharge because the charge is considered to be groundless, or because the application for postponement by the prosecution was turned down and the prosecution unable to proceed should only be a discharge not amounting to an acquittal. (Penekanan ditambah.)

[20] Pada hemat saya, ratio yang diberikan dalam kes di atas adalah berkaitan dengan kuasa majistret yang hanya boleh memberikan perintah DNAA di bawah s 173(f) Kanun Tatacara Jenayah dan bukannya di bawah s 254(3) Kanun yang sama. Ini adalah kerana, dalam kes *Chu Chee Peng v Public Prosecutor* [1973] 2 MLJ 35; [1973] 1 LNS 18 tersebut, Ong Hakim Besar Malaya (ketika itu menyatakan):

Under s 66 of the Courts of Judicature Act 1966 the questions referred for the decision of this Court are as follows:

(a) *Whether a Magistrate in a summary trial is authorised by the provisions of s 173(g) of the Criminal Procedure Code* (FMS Cap 6) to rule that a charge is groundless (for reasons to be recorded) at any stage after plea and in the course of hearing prosecution witnesses but before the conclusion of the prosecution case

...*Where the sole or main prop in the prosecution case prematurely collapses, the prosecuting officer may in his discretion offer no further evidence.* In that event, if it is clearly foreseeable that the witnesses remaining to be called would be unable to establish a prima facie case in the teeth of evidence previously recorded, *the accused may, of course, be acquitted, but such an order would in effect fall to be made equally well under para (f) of s 173, OR sub-section (ii) and (iii) of s 254 of the Criminal Procedure Code.* (Penekanan ditambah.)

[21] Walau bagaimanapun, dalam kes yang sama hakim tersebut turut menyentuh tentang s 254(3) Kanun Tatacara Jenayah dan pada hemat saya ianya merupakan satu pengiktirafan bahawa majistret boleh memberikan perintah A&D di bawah peruntukan tersebut kerana pihak pendakwaan tidak

lagi berniat dan berminat untuk membuktikan kes mereka. Dalam masa yang sama, s 254 Kanun Tatacara Jenayah sendiri tidak mengikat majistret untuk mendengar semua keterangan didengar terlebih dahulu sebelum boleh memberikan Perintah A&D berbeza dengan peruntukan di bawa s 173 Kanun Tatacara Jenayah.

[22] Perkara ini boleh disahkan berpandukan kepada kes *Public Prosecutor v Au Seh Chun* [1998] 6 MLJ 179 di mana Suriyadi Halim Omar, Hakim Mahkamah Tinggi (ketika itu) menzahirkan pandangannya:

> *Under s 254 at any stage of any trial, before the delivery of any judgment, the Public Prosecutor may inform the court that he will not further prosecute the charge and thereupon the accused shall be acquitted.*
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> *In other words there is no necessity for the Magistrate to consider further as to the viability of the charge but merely to acquit and discharge the accused after being informed.*
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> *Under this provision, unlike that of s 173(f), the evidence is yet to be heard or adduced by the prosecution. Where the proposal of not continuing with the prosecution comes from the prosecuting officer,* leave must first be obtained from the court. This difference of approach is perhaps due to the desire of Parliament to permit the court to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purpose by the latter's prosecutors (*The State Of Bihar v Ram Naresh* [1957] Cr LJ 567).
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> Under this provision such discharge shall not amount to an acquittal unless the court so directs. *In other words, for him to be recorded to have been acquitted, it must be pursuant to the pro-active act of the learned Magistrate who must so specify the details. Notwithstanding this supposed room given to the Magistrate, it is quite established that whenever the prosecution has indicated to the court that it is not interested in pursuing the matter, the court then shall acquit the accused.* (Penekanan ditambah.)

[23] Justeru, berpandukan nas undang-undang serta prinsip mantap yang telah digariskan melalui semua otoriti di atas berkaitan aplikasi s 254 Kanun Tatacara Jenayah, pada hemat saya majistret telah tersalah arah apabila memberikan perintah DNAA kepada perayu apabila pihak responden sendiri telah memilih untuk tidak meneruskan pertuduhan ke atas perayu tanpa menyatakan sebarang alasan yang mana ianya boleh disimpulkan sebagai tidak akan menawarkan sebarang keterangan lanjut bagi menyokong pertuduhan yang dibuat sebelum ini.

[24] Tindakan pihak responden tersebut sebenarnya telah melayakkan majistret untuk menggunakan kuasanya di bawah s 254(3) Kanun Tatacara Jenayah untuk memberikan perintah A&D kepada perayu supaya dia dapat terlepas daripada pertuduhan tersebut secara mutlak dan boleh hidup dengan aman tanpa perlu bimbang dengan kemungkinan dipertuduhkan semula dengan pertuduhan yang sama. Pada hemat saya, semua orang mempunyai hak

untuk hidup dengan aman tanpa sebarang ketakutan, kebimbangan atau ketidakpastian akan dituduh semula sepertimana yang telah termaktub di bawah Perlembagaan Persekutuan.

KEPUTUSAN MAHKAMAH

[25] Saya memutuskan untuk menggunakan kuasa semakan saya di bawah ss 323 dan 325 Kanun Tatacara Jenayah dan mengusik keputusan yang telah diberikan oleh majistret dalam kes ini dengan mengubah perintah terhadap perayu tersebut daripada *dilepaskan tanpa dibebaskan (DNAA)* kepada *dilepaskan dan dibebaskan (A&D)* daripada pertuduhan di bawah s 182 Kanun Keseksaan.

Semakan dibuat, perayu dilepaskan dan dibebaskan.

Dilaporkan oleh Izzat Fauzan